

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

REINHART FOODSERVICE, L.L.C., d/b/a AGAR

and

Case No. 1-CA-106712

**GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
& HELPERS OF BROCKTON & VICINITY, LOCAL 653**

William Slack, Esq., Counsel for the General Counsel.

Renee Bushey, Esq., Feinberg, Campbell & Zack, P.C., Counsel for Charging Party.

Kenneth Sparks, Esq. and James Glenn, Esq., Vedder Price, P.C., Counsel for Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in Boston, Massachusetts on November 19, 20 and 21, 2013¹. The Complaint herein, which issued on September 30 and was based upon an unfair labor practice charge and an amended charge that were filed on June 7 and June 28 by General Teamsters, Chauffeurs, Warehousemen and Helpers of Brockton & Vicinity, Local 653, herein called the Union, alleges that Reinhart Foodservice, L.L.C., d/b/a Agar, herein called the Respondent, discharged Michael Celluci on May 29 because of his activities in support of the Union as well as his protected concerted activities, in violation of Section 8(a)(1)(3) of the Act.

Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

Reinhart Foodservice, LLC, a subsidiary of Reyes Holdings, is a corporation engaged in the wholesale distribution of food products with facilities located throughout the United States, including facilities in Taunton and New Bedford, Massachusetts. Prior to September 2012, the Taunton facility was owned by Agar, a company unrelated to Reinhart. Reinhart purchased the assets of Agar in September 2012, hired a majority of Agar's employees at the facility, and has operated that facility since that time. While the Taunton facility was owned by Agar, the Union unsuccessfully attempted to organize its employees in 2002, 2007 and 2010. After the Respondent purchased the facility, the Union solicited authorization cards from employees, filed a petition with the Board in February, and won the Board election conducted on April 1 and 2. In the latest organizing drive, Celluci was active for the Union in soliciting authorization cards, he

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2013.

was the Union's observer at the election, and was selected to be one of the shop stewards. It is alleged that he was discharged in retaliation for engaging in these activities, in violation of Section 8(a)(1)(3) of the Act. Respondent defends that his support for the Union played no part in his discharge. Rather, he was discharged because on May 14 he failed to report an accident that he had with his truck. In addition to Celluci, the principal characters involved herein are Donald Mahnken, who had been the operations manager in New Bedford, and transferred to Taunton after the election, and Erica Rodrigues, the human resources manager for both Taunton and New Bedford until June, when she began to cover New Bedford only. John Brown and Adam Nataupsky were the supervisory employees in charge of the drivers, while the drivers immediate supervisors were Susan Dunn, who left the Respondent's employ in July, and William Colon, the morning dispatchers, and Douglas Thatcher and Lacey Oliveria, the afternoon dispatchers.

A. Organizing of the Taunton Drivers

There were unsuccessful attempts to organize the Agar employees at the Taunton facility in 2002, 2007 and 2010; due to a work related injury, Celluci was not a participant in the 2010 organizing drive, although he was active in the two earlier attempts. Brown and Nataupsky testified that they were aware of his support for the Union and that this support was well known by management at Agar. Thatcher also testified that Celluci's support for the Union was well known because, "He talked about it and others talked."

Celluci testified that he contacted Brian McElhinney, Union president, in about November 2012 and told him that he would like the Union to organize the Respondent's employees. About a week later, they met, spoke about the employees, and McElhinney gave him Union authorization cards to distribute to the employees. Beginning in November 2012 he distributed cards to employees, sometimes one at a time, and at other times he gave a large number of cards to employees to be distributed by them. He did this in the parking lot and any other place where he met employees, and he periodically returned signed cards to McElhinney. The Union filed a petition with the Board in February and from that time to the election, Celluci continued to speak to the employees about "the good points" of the Union. These conversations took place in numerous locations throughout the facility, including the parking lot, the yard and the driver's room, and he was the Union's observer at all three sessions of the election conducted on April 1 and 2. Fellow employee Thomas Hussey testified that in about December 2012, Celluci approached him about assisting in the organizational drive and he and Celluci met fairly regularly discussing how to get the employees "onboard" with the Union. McElhinney testified that in his initial contact with Celluci in about November, Celluci told him that the company had been sold and that it might be a good time to start another organizing drive. After that, he met regularly with Celluci, giving him additional authorization cards, and receiving feedback from Celluci on the progress of the drive. In addition to Celluci, about twenty other employees also distributed authorization cards for the Union. The Union won the election by a vote of 97 for the Union and 91 against; no objections to the conduct of the election were filed. On May 5, he conducted a meeting with the Taunton employees and Celluci was chosen to be one of the Union's shop stewards, and McElhinney informed the Respondent of his selection.

Celluci testified that in December 2012 while he was doing paperwork in the drivers' room at the facility, Brown approached him and said, "You know, people who do union activity on company property tend to get in trouble." Celluci did not respond. Celluci did not mention his in the affidavit he gave to the Board. While Brown was never asked specifically if he made this statement to Celluci, he testified he never had a conversation with him about the Respondent's no solicitation policy and does not recall having "that" conversation with him, although Celluci frequently spoke to the other employees during this period. Celluci also testified that beginning

about March 1, the Respondent had “Vote No” buttons sitting outside the window of the transportation office where Brown and Nataupsky sat. The drivers are required to come to that window in the morning to obtain their equipment, and in the evening to return the equipment. He testified that Thatcher and Oliveria wore the buttons and that he overheard them and Dunn and Colon tell employees that if they wanted one, they could take one and wear it, although Celluci did not mention this in the affidavit he gave to the Board. Hussey testified that the Vote No buttons were on the ledge of the drivers’ room for about a week. One morning, Dunn pointed out the basket to him and asked him if he wanted to wear one. Dunn testified that she never asked an employee to wear a Vote No button. Brown testified that the Vote No buttons were available on the ledge by the window, but that he never asked a driver to take one.

In addition to the above, there was testimony from Celluci, Hussey and employee Quinton Baker about statements made at pre-election meetings that the Respondent conducted to encourage the employees to vote against the Union; no unfair labor practice charge was filed regarding any of the statements made at these meetings. Celluci attended about five such meetings. They were attended by small groups of employees, rather than all the employees at each meeting, and they were usually conducted by Greg Burgess, who had been the CEO of Agar at the time of its acquisition by the Respondent, and became the Division President for Reinhart Boston. Celluci testified that at these meetings Burgess said that he couldn’t promise them anything, but in negotiations, “...we start with nothing, we have to negotiate every last thing we got, and we could end up losing.” He also said, “...that he believed that a lot of customers, because we were union, would stop ordering from Agar and really hurt our business.” In that regard, the Respondent moved into evidence a letter that it sent its unit employees during the campaign:

Rumor #3 If the Union gets in, Reinhart will close the facility.

TRUTH Reinhart will not close this facility just because a union comes in. We have significant investment in the building and in our employees. However, as we have said before, true job security comes from our ability to meet customers’ demands at a competitive price. If the Union makes unreasonable demands in contract negotiation that we cannot agree to, then we are all at risk if the Union takes you out on an economic strike. That hurts job security.

Hussey testified that he attended these company meetings in about February and March. A number of people, including Burgess, spoke, saying: “...Unions did nothing but lie, they couldn’t do anything for you...they couldn’t make promises.” That was all he remembered until Counsel for the General Counsel asked if anything was said about bargaining: “Yes. That you’ll lose all your seniority, vacation time and everything would start off from scratch, you wouldn’t have anything to stand on, and everything was bargained for...” However, while being questioned on cross examination, his recollection of what was said at these meetings was so uncertain that his testimony on direct examination about these meetings has been discounted. Baker testified that he attended two of these meetings where Burgess said: “...[unions are] there to take our money...the bargaining procedure is...they give us something we have to give up something. Like an example used, if we get more money we got to give up something like seniority...” When Counsel for the General Counsel asked if anything was said about customers, he testified:

Yeah, he said...if we get a union in we may lose customers because customers are a little uneasy with unions, they don’t feel secure with a company that has a union in it because any time we could go on strike if its contract time or whatever. And we may lose customers, and if we lose customers...we could start losing our jobs because there

won't be enough customers...for the drivers to deliver to.

On cross examination he testified that prior to these meetings, he already had made up his mind on how he was going to vote, so "...what he was saying was like irrelevant to me, so a lot of it was just in one ear and out the other."

Burgess testified that he spoke to groups of employees in March about the upcoming election. The meetings each lasted about an hour and there were many meetings held each week so that all the warehousemen (they had three shifts) and the drivers could attend. He received the "talking points" of the meeting about a week prior to the meetings, and reviewed these points, and made his own notes as well as highlights of what he wanted to say. He wanted it to seem more of a "...natural conversation and presentation versus standing in front of the room and reading to everybody." Some of the things that he said from his talking points during the week of March 11:

By now, I'm sure the Teamsters have made some promises to you about what will happen if they get in and start negotiating...But, before I begin, I want to remind you about the ground rules that the Company has to follow during a campaign. I cannot predict what will happen if the Union gets in, nor can I promise to make any changes if the Union does not get in

I want to start with this very important point. In collective bargaining, NOTHING IS GUARANTEED. You do not automatically get raises, free insurance or anything else. What you get is a trip to the bargaining table.

In his speech during the week of March 25, he spoke of the possibility that the Union and the Company could not reach an agreement, with a number of possible results, one of which is that the Union could call a strike:

Strikes happen when a union miscalculates a company's willingness to stick to its guns. Don't misunderstand me. I am not predicting a strike. I do not want one...We have a lot of needy customers. How do you think they will handle even one day of service disruptions? How attractive might our competitors suddenly look to our customers if there is even a threat of strike? A restaurant can't wait until the strike happens and they're not getting food. They will move when they are uncomfortable, and I guarantee our competitors will use our union situation to get the business. And if customers left, how can the Union guarantee there won't be massive layoffs?

He also testified that he never told the employees that, in negotiations, that they would have to bargain from scratch and never said that customers would leave if the Union were voted in.

B. May 14 and May 15

Celluci began working for Agar in 1985 as a warehousemen; he became a driver in 1988 and remained in that position with Agar until the Respondent purchased the facility in September 2012 and continued working for the Respondent until May 30. The truck that he drove was twelve feet, six inches high and is approximately twenty seven and a half feet long. The entry into the rear box of the truck is forty two inches high, which is the usual height of the docks that the trucks back into. The rear of the truck has a ramp about three to four feet wide by sixteen to eighteen feet long that can be pulled out and when fully extended, can be used to walk from ground level to the back of the truck. Above the cab that the driver sits in is a diesel powered motor that cools the refrigeration system and the freezer on the truck. The door leading

to the freezer is just behind the passenger side door of the cab. The refrigeration door is accessible from the rear of the truck.

If Celluci's testimony is to be believed, he noticed nothing out of the ordinary on May 14. He reported for work at about 6:00 a.m., made fourteen deliveries, and returned to the facility at about 6:00 p.m. Because he was not feeling well, upon returning to the facility he went to the bathroom and didn't have time to conduct his usual post-trip inspection report of his truck and did an abbreviated one instead without noticing any damage to the truck. He backed his truck into a dock at the facility where the undelivered products were removed, and after the truck was stripped he turned in his papers, any checks or cash that he received, and his scanner, took his truck into the yard and parked it in the designated location in a row of other trucks, clocked out and left without seeing any damage to his truck.²

Not surprisingly, due to the nature of his job and the extent of the damage to his truck, counsel for the Respondent questioned Celluci extensively about his actions on May 14. His first stop that day was to Sarku Japan, a restaurant which he had previously delivered to. He testified that he spent approximately one hour at the Sarku Japan stop and then drove to the next stop, Tedeschi, which involved about ten cases. At this stop he climbed into the back of the truck rather than using the ramp, put the cases on his hand truck, brought the goods into the store in one trip, returned to the truck, placed the hand truck in the back of the truck and left for his next stop, Family Care Crest Catering. This was a larger order that required him to use the ramp many times to get to the back of the truck, and to walk on the passenger side of the truck to unload some goods from the freezer on one occasion. The next delivery was to Foodies, a supermarket. He was there for about an hour and made many trips in and out of the truck and the freezer. The next delivery was to another Tedeschi's which involved using the hand truck to remove the cases off of the back of the truck and returned the hand truck at the conclusion of the delivery. At the next stop, which involved two customers, he had to make a couple of trips to the freezer, and a couple of trips to the back of the truck using the ramp. The next stop had a large outside dock that allowed him to back up flush with the building, but he also had frozen products that had to be taken from the freezer. The next stop was also an outside dock with some frozen goods that required him to get the products from the freezer. The next stop was a street stop that required him to use the ramp to get to the back of the truck as well as some goods from the freezer. Celluci was uncertain about the next stop other than it involved "a fair number of cases." At the next stop he used the ramp to unload the truck and the frozen foods from the inside of the truck, rather than from the door on the passenger side of the truck. He had to make a few trips into the truck at this stop. At the final stop he had a lot of cases to unload from the truck and then drove back to the facility. Celluci estimated that on that day he walked along the passenger side of the truck between fifty and one hundred times and was in and out of the back of the truck about the same number of times.

He reported for work the following morning at about 5:00 a.m. and began to follow his usual routine. He went into the driver's room, picked up his paperwork and his scanner and checked the list to see which truck he would be driving and saw that he was driving a different truck that day. He looked in the lot and saw that his truck was in a different location than he had left it the previous day. He also noticed that the roof was damaged. He climbed to the top of the

² Celluci testified that on May 15, after the damage was discovered, in filling out an accident report at the request of Thatcher, his best guess is that it occurred at Sarku Japan, his first delivery on May 14, because that was the only delivery that day with an underground service tunnel that contains low hanging metal pipes which could damage a truck that attempted to pass beneath them.

truck in order to see the damage close-up and observed that the seam connecting the sheet metal on the roof was separated running almost the entire length of the roof, about a foot from, and parallel to the passenger side of the truck. In addition, a piece of sheet metal, about four to six inches high and approximately five feet long had been dislodged and was peeled back and was sticking up along, but not extending over, the passenger side of the truck. He climbed down and checked the mileage on the truck to see if it had been driven after he dropped it off, and it hadn't, which meant "that I had to have done the damage." He then went to report the damage and met Colon and brought him to the truck and told him that he must have damaged the truck the prior day. Colon asked him, "You didn't see that?" and Celluci said that he didn't, and they returned to the office. At that time he asked Colon if he should fill out an accident report, and Colon said that he could do it at the end of the day when he returned. He testified that, prior to that, he had not spoken to Dunn about the accident, but that after Colon told him to complete the accident report when he returned at the end of the day, Dunn asked him if he had been in an accident, and he said, "I seemed to" and she replied that there was damage to his truck.

Dunn testified that shortly after she arrived at the facility on May 15 at about 4 a.m. Rodrigo Borges, a yard man, told her that one of the trucks had significant roof damage and was taken out of service. She immediately began looking to determine who had driven the truck on the prior day and to locate a replacement truck. Colon was in the yard at the time and she asked him to look-over the damage on the truck. Shortly thereafter, Celluci came into the dispatch office and asked where his truck was and she told him that it was out of service due to the damage to the truck. She asked if he had damaged the truck and he said no, and she asked him if he did a post-trip inspection and he said that he did. During that conversation, Celluci never indicated that he was already aware of the damage to the truck. At the conclusion of this discussion, Dunn sent an email to others in the dispatch department, including Colon, Brown, Nataupsky and Thatcher, regarding her conversation with Celluci; she testified that such an email is "protocol." The email sent at 7:14 a.m. states:

Yardman Rodrigo Borges took 2641 out of service because there is considerable damage to the passenger side top.

Mike Celluci was the last driver to have it, I asked him if he did the damage he said no. I asked him if he did a post trip and he said yes.

Willie also spoke to him.

Colon testified that he reported for work on May 15 at 4 a.m. Shortly thereafter, a yardman told him that he discovered that one of the trucks had significant damage and he took it out of service. At about 6:00 he went into the yard to fix a Xata GPS unit on one of the trucks, which he does on a fairly regular basis. After he had repaired that unit, he went to check on the damaged truck and, at that time, he saw Celluci walking out of the door into the yard. They walked together to the truck and while Colon looked at the truck, Celluci climbed to the top of the truck; Colon asked him, "Didn't you see that on your post trip?" and Celluci answered, "Apparently, I must have missed it." Colon testified that you could see the damage from a distance, and you could also see it from the back or the side of the truck. Celluci then said that it could have happened at Sarku Japan. Colon then walked into the dispatch office with Celluci behind him. Celluci never offered to fill out an accident report at that time. After he returned to the office, Dunn told him that no accident report had been filed, but that Celluci, "Couldn't have missed the damage." After returning, his supervisor asked him to prepare an email of that morning's events. The email, sent at 8:01 to Dunn, Brown and Nataupsky, states:

Just wanted to let you know what he said to me this morning.

I happened to be outside working on a Xata with another driver and he called me over to look at the truck with him after I finished.

5 The passenger side rear of the truck had a large piece of aluminum hanging upwards, looks like it was peeled back. Mike went upon those side front steps right near the driver's side door to look at the top of it himself.

10 I asked him what happened and he said it could have happened at Sarku Japan because he was on the South Shore run yesterday.

I asked him after that, Did you not do a post trip at the end of the day, because there's no way you could miss this large piece of metal hanging over like that.

15 Mike said, apparently, I didn't see it.

20 Nataupsky testified that at about 1 a.m. the morning of May 15, he received an email from a "yard jockey" at the facility stating that he discovered damage to truck 2641. When he arrived that morning at the dispatch office, Colon told him that Celluci's truck had new damage on it, and that the damage was unreported. He had spoken to Celluci about it, and Celluci told him that it had to have occurred at Sarku Japan. Nataupsky then called Burgess to inform him of what had occurred, and he checked Celluci's post-trip inspection from the prior day which listed no damage. He testified that in a post-trip inspection Celluci would "absolutely" have seen the loose metal hanging and part of the inspection was the lights of the truck, and one set of lights was just below the loose metal. Celluci's post-trip inspection report generated by Xata, states that he did an eleven minute post-trip inspection that day.

30 Brown testified that he was on vacation during the week of May 12 and he received the emails from Dunn and Colon regarding Celluci's damaged truck. He called Nataupsky and told him to report the situation to human resources since it involved an unreported accident.

35 Celluci returned to the facility at about 6:30 and waited to meet with Thatcher to complete an accident report. When he met with Thatcher, he told him that he damaged the truck, but he didn't know where it happened. He testified that Thatcher told him that he can't write a report that says that you don't know where the truck was damaged. You have to list a location. Celluci said that the only place that he could think of was the South Shore Mall with the low ceiling.

40 The Respondent has Accident Kits that are kept in all of its trucks. It contains a check off list, an accident report form and a camera. He testified that "it would be best" if the drivers completed the accident report right when the accident occurred; but that "is not required. There is no policy that says you need to do it right there. It just says you need to report it immediately." If the report is not completed when the accident occurs, it must be completed when the driver returns to the facility at the end of the day. Thatcher testified that Nataupsky called him at about 45 1:00 on May 15 and told him to meet with Celluci when he returned from his run and have him complete an accident report. When Celluci returned to the facility that day, Thatcher met him and told him to fill out the report and Celluci filled out the report at that time. Celluci never said that he was unsure where the accident occurred, and Thatcher never told him to write Sarku Japan as the location of the accident. After Celluci completed the accident report, Thatcher sent 50 an email to Nataupsky at 5:07:

I had a short interview with Mike on the damage to his truck. He said that the height of

the truck has been checked with security at Sarku and should not have had an issue with clearance. I said to Mike that has nothing to do with how this was missed in his post trip inspection. He said he did it but didn't look up. I told him that the damage was right above a marker light and all he said was I guess I missed it.

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Rodrigues testified that Nataupsky told her on the morning of May 15 that a vehicle at the facility had been damaged, but that it appeared that the driver did not report the damage. She told him to interview everybody familiar with the situation and to report the results of the investigation to her. The reason that she was informed of the situation was that disciplinary action would probably be required and because the facility was newly organized, everything was to go through human resources. Because she had not previously been employed at a unionized facility, Mike Mason, an employee of Reyes, as well as counsel for the Respondent were to assist her in the situation. Beginning on about May 20 she received emails and statements from Colon, Dunn, Thatcher and others and reviewed them with Mason, among others. He advised her that since the situation could result in a termination, the Union should be notified of the situation and be invited to attend any meeting involving Celluci. She decided not to suspend him at that time because she had not yet heard his side of the story, but on May 22 she sent a letter asking him to attend a meeting involving the damage to his truck. The meeting was scheduled for May 29, because Monday May 27 was a holiday and the following day would be a very busy day with deliveries. Rodrigues also wrote to McElhinney on May 22, stating:

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We are writing to inform you that on Wednesday, May 29, 2013 we will be meeting with the above cited employee [Celluci] to review the facts and determine if he will remain in the employment of Reinhart Food Service.

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The facts as we currently know them are that damage was sustained to a vehicle Mr. Celluci operated on 5/15/2013 and was not reported on his post trip inspection report.

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You are welcome to attend this meeting which is scheduled for 8 a.m. Please contact me to let me know if you plan to attend.

C. May 29 and May 30

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Celluci called in to the facility on the evening of May 28 to get his start time for the following day and the recording said that his start time was 8 a.m., which is the usual discipline start time. He testified that when he arrived at the facility that morning, he met with Nataupsky and Rodrigues and they asked him how his truck was damaged on May 14. He said that he didn't know what he hit, "...and I admitted that it had to be me, and I missed it when I came back, I didn't write a proper post trip." At that point, McElhinney appeared and Rodrigues and Nataupsky said that they would restart the meeting since McElhinney came late and Celluci repeated what he had said before McElhinney arrived. McElhinney asked Rodrigues what were the "repercussions of the accident" and she said that because he had a clean record and it was his first time, "it's not usually a big thing," although the affidavit that he gave to the Board does not state this. At the end of the meeting Rodrigues said that they would call McElhinney and let him know what they decided, and "that I only needed a reset³ and I'd be starting at my regular time the next day, the 30th." That evening he received a call from Nataupsky saying that he should be at the front door of the facility the next morning at 9:00, and he called McElhinney to

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³ In the trucking industry, there are strict federal regulations regarding hours worked, and if you return too late from a run, you cannot leave the next day without waiting a certain number of hours for a reset.

tell him. McElhinney testified that after receiving the May 22 letter on May 28, he called Rodrigues to say that he would be at the meeting and asked her whether Celluci was currently working and whether or not he had been disciplined or was going to be disciplined. She said that he had not been disciplined, was currently working and she would see him in the morning. When McElhinney arrived at the facility, he was told that Celluci had already told his story, but because he missed it, that they would restart the meeting. Celluci said that when he arrived for work on May 15, he noticed the damage for the first time and reported it to Colon. It must have been him, but he did not know where it happened and on that day he filled out an accident report. McElhinney asked Rodrigues if there was any discipline pending from the meeting and she said no, that she didn't feel that it was going to be a big deal, that he had an excellent safety record and she appreciated his honesty, but that "she needed to run this up the flagpole" because the Union was representing Celluci. He told Rodrigues and Nataupsky that as he was representing Celluci, he expected that any future communication should come directly to him, and he and Celluci left the meeting.

Nataupsky testified that he, Rodrigues and Celluci met in the HR office at the facility on the morning of May 29. Rodrigues said that she and Nataupsky were there to investigate what had occurred and Celluci said that he must have hit something at Sarku Japan. He did not see the damage all day and when he returned to the facility he felt ill, did a poor post trip and went home. When he reported for work on May 15 he saw his truck with the damage, got into the truck to check the mileage and realized the truck had not left the facility since he returned the prior day and he reported the situation to Colon. However, Nataupsky testified that he had previously spoken to Colon and Dunn about the situation, and neither one said that Celluci had been ill or that he had reported the accident. After Celluci told his story, they told him that he was suspended pending further investigation, and he left. On the way out, Nataupsky saw McElhinney in the lobby and they restarted the meeting. Celluci repeated the facts, they said thank you, he left and McElhinney remained in the office with them. McElhinney said that he would like to be involved in these cases in the future and said that since "...there is no contract, you can do what you want." McElhinney left and Rodrigues told him that the investigation would take another day or two. He testified that he never told Celluci at this meeting that the accident was "no big deal." After this meeting, he and Rodrigues met with Mahnken and Brown, discussed the accident, and decided that Celluci would be terminated, and he called him and told him to be at the facility the next morning at 9:00.

Rodrigues testified that she told Nataupsky to ask Celluci to come to her office on May 29 at 8:00. She told Celluci that they were there to investigate what happened on May 14 and 15 and that they wanted to hear his side of the story. He said that if he did the damage he was not aware of it, but that he is guilty of doing a poor post-trip inspection, but he was ill when he returned, and that is why he did a poor inspection. She told him that he would be placed on an unpaid suspension, that they would investigate further, and would be in touch with him within twenty four hours. Her phone rang and she was told that McElhinney was waiting in the lobby. She brought him in to her office and told Celluci and Nataupsky that they would restart the meeting with McElhinney present. Celluci repeated what he had said earlier, and left the room. McElhinney told her that he appreciated being invited to the meeting, but since there was no contract, they could do whatever they wanted with Celluci. She testified that during these meetings that day, she did not comment on Celluci's driving record, nor did she suggest that the company had no intention of making it a serious disciplinary matter. After McElhinney left, she and Nataupsky met with Mahnken to discuss the situation. At the conclusion of that meeting, they concluded that Celluci should be terminated for failing to report the accident that he had on May 14.

Mahnken has been the director of operations for the Respondent at the Taunton facility

since April 23; he had previously been employed at the Respondent's New Bedford facility. He testified that he was transferred to Taunton because he had prior experience at large unionized facilities. On about May 29, he received a call from Rodrigues saying that she was investigating a situation involving an unreported accident, and she asked if he had time to discuss it with her, and he said that he did. He met that afternoon with Nataupsky and Rodrigues and they told him of the damage to the truck and that it had not been reported by the driver. They also told him that they met that morning with Celluci and McElhinney and told them of the disciplinary policy and the accident policy. He also was given the written statements by Dunn and Colon and was shown a picture of the damage to the truck. He described the damage as significant for a number of reasons: the cost of repair, it is a safety hazard and the damage to the roof could cause damage to the products in the truck. As to whether Celluci should have noticed the truck damage on May 14, he testified:

I believe it would have to been noticed, yes...It was early in the morning. The driver had approximately 10 to 12 stops remaining for the day. The freezer door's on the right side. Typically every stop that we deliver to...has freezer product that is delivered so the driver would have to walk...to that side of the truck...Typically the driver's unloading also from the rear door and it would be visible from the rear door as you walked around the truck...it would be hard not to have noticed that during the course of the day.

In addition, he testified that if the driver had performed a post-trip inspection, he should have seen the damage because the biggest damage is next to a marker light that is part of the inspection. He then discussed with Rodrigues prior situations at Agar and Reinhart regarding unreported accidents and her experience with a New Bedford driver who was terminated for that reason shortly before Mahnken began working there. At the conclusion of the discussion, he decided that considering the nature and the expense of the damage, termination was appropriate.

Celluci, McElhinney, Nataupsky and Mahnken met in Mahnken's office at 9:00 on May 30; Rodrigues could not attend the meeting due to a conflicting engagement. Celluci testified that Mahnken began the meeting by saying that he didn't know what it was all about, it should have been a "done deal" as he admitted everything and McElhinney okayed it. Celluci then said that he didn't admit anything other than that he missed the damage on the post trip inspection and that he had an accident. McElhinney said that he didn't approve of anything, and Celluci was asked to leave the room. Later, he was called back in the room and was asked what had happened on May 14 and 15. He said that when he reported to work on May 15, he saw the damage for the first time and reported it to Colon. At about that time, Mahnken said that he wanted to investigate the matter further and he and Nataupsky left the office; when they returned, Mahnken told him that he was terminated. McElhinney testified that Mahnken opened the meeting saying that it should be a quick meeting as Celluci had admitted that he didn't report the accident and McElhinney had agreed at the prior meeting that he should be terminated. McElhinney stopped him and said that he was wrong and that he had never agreed that Celluci should be terminated. Mahnken asked Nataupsky and Celluci to step outside and he told McElhinney of his experience at unionized facilities and apologized for the way he had been treated. He told Mahnken that Celluci was important to him; he was the leader of the Union's organizational drive and was the shop steward for the Union. Nataupsky and Celluci returned to the office and McElhinney stated that Celluci had a good driving record, he had reported the accident, and it didn't warrant his termination. Mahnken asked Celluci to describe what happened and he said that he was ill on May 14 and he only did a quick post trip inspection, but on the following morning when he saw the damage to his truck, he reported it to Colon. Mahnken then said that he wanted to speak to Colon and left the office. When he returned he said that he had emails that would refute Celluci's claim that he had reported the accident and

asked McElhinney if they could speak privately and Nataupsky and Celluci left the office. McElhinney told him that he would take the case to arbitration, if he had the power to do so and he didn't feel that the company had a strong case. He testified that Mahnken agreed that the company did not have a strong case and that he would like to settle the issue in order to get off
 5 to a good start with the Union. He said that he wanted to talk to his superiors who McElhinney identified as Burgess. When he returned, he said that he couldn't resolve the issue and Celluci's termination letter was in the mail.

Nataupsky testified that when the meeting began Mahnken asked Celluci if he had
 10 reported the accident, and he said that he had. Nataupsky testified that he was not aware that Celluci was claiming that he had reported the accident, and neither was Mahnken, who said that he wanted some time to speak to the dispatchers to do some additional investigation. When he returned, he said that he had completed his investigation, and that Celluci would be terminated. Dunn testified that on that day, Mahnken asked her about her conversation with Celluci on May
 15 15, and she told him that Celluci denied damaging the truck or seeing the damage and said that he did a post-trip inspection of the truck. Colon testified that Mahnken questioned him on that morning as well, about the events on May 15. He told him that he was checking a GPS unit with another driver and on the way back was going to check the damaged truck. From a distance he could see the damage to the truck and during his meeting with Mahnken, Celluci's support for
 20 the Union was never discussed.

Mahnken testified that he began the meeting by saying that everyone was aware that there was an unreported accident with major damage and the company policy for such an infraction calls for termination. At that point, either McElhinney or Celluci said that he did report
 25 the accident. He then asked Nataupsky if he was aware that Celluci was claiming that he reported the accident, and he said that was the first that he heard of it. Mahnken asked Celluci to leave the room and told McElhinney that he believed that the accident had not been reported. McElhinney responded that Celluci was going to be his shop steward and had called him the night before to say that he had reported the accident. Mahnken then attempted to call Rodrigues
 30 to ask whether she was aware that Celluci had reported the accident, but was unable to contact her and left a voicemail for her. He returned to his office and asked Celluci to tell him what occurred on May 14 and 15. He said that it could have occurred at Sarku Japan, which has an underground parking area, and Mahnken asked him if he felt any damage while he was there, and he said that he didn't. He then decided to speak to Colon and Dunn. There were statements
 35 from them, but he had not spoken to them. He questioned Dunn first. He told both Dunn and Colon, "I don't care if you like Mike or you don't like him, I don't care if he's our best or worst driver, what I need is information that is accurate." He asked Dunn what occurred on the morning of May 15. She said that Celluci came in to the dispatch office and asked where his truck was. She asked him if he knew that it was involved in an accident and he said no. She
 40 asked if he knew there was damage to the truck, and he said no. She asked if he did a post trip and he said that he did, and she asked, "didn't you see the damage when you did the post trip?" and he said no, and she asked him how he could miss it. Mahnken then called Colon to speak to him, and asked him what he knew about the accident and if Celluci reported it to him. Colon said that one of the yardmen had reported the damage to the truck to them overnight. While
 45 Colon was in the yard that morning, Celluci said to him, "I hear there's damage to my truck" and Colon said, "Let's go look at it." That was the extent of his involvement in the situation. When Mahnken returned to his office, he told Celluci and McElhinney that he had confirmed his information and that he was going forward with the termination. During this meeting, he never suggested that he could not win an arbitration on the discharge, and he did not attempt to
 50 negotiate a settlement of the case with McElhinney, nor did he say that he would seek authority to negotiate a settlement. In his position, he did not need anyone else's authority to negotiate a settlement.

D. Company Policy Regarding Disclosure of Accidents

This is more complex than usual, because there are three companies involved in this matter; Agar, Reinhart, and Reinhart's parent company, Reyes Holdings. Reinhart's Employment Guidelines lists Major Work Rules Violations: Unacceptable behavior in the workplace that would normally result in separation for a first offense, and Minor Work Rule Violations, which would normally result in discipline and may, individually or cumulatively, result in separation depending on the seriousness of the offense(s). One of the listed Major Work Rules Violations, under Safety, is "Failure to report a work related accident, incident or injury to your supervisor within 24 hours," but it is also listed as one on the Minor Work Rule Violations. Reinhart also has a Router Driver's Supplemental Handbook which, under Safety, states:

Every driver involved in an accident, which results in an injury to or death of a person/persons, or property damage of any kind, regardless of the amount, must:

Stop immediately.

Take all necessary precautions to prevent further accidents.

Render all reasonable assistance to injured persons.

Contact the local police department.

As soon as practical, report the accident to the Transportation Department and complete an accident report.

Agar maintained the following Vehicle Accident Reporting & Review Policy Procedure:

ALL ACCIDENTS, HOWEVER MINOR, WHETHER INVOLVING PERSONAL INJURY TO ANOTHER PERSON, TO THAT PERSON'S VEHICLE, TO ANY PROPERTY OR TO YOUR AGAR VEHICLE MUST BE IMMEDIATELY REPORTED TO DISPATCH. FAILURE TO REPORT ACCIDENTS WILL RESULT IN SEVERE DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION. [Emphasis supplied]

Reyes maintains a rule entitled Collision Response and Reporting Protocol, stating: "Drivers must immediately report **any and all** collisions, regardless of how small to their Transportation Manager or supervisor. Failure to report a collision and/or submitting false collision reports may result in immediate termination, regardless of the severity of the collision." [Emphasis supplied].

Nataupsky testified to a situation in New Bedford in 2009, while he was a manager at that facility. A truck operated by driver, Oscar Quijada, jack knifed and because the freezer side door was inadvertently left open, it came off the hinges. Quijada tried to put the door back on to the truck and drove the truck back to the Agar facility, without reporting the accident. When that truck went out the following morning, the door fell off. When initially questioned about the incident, he denied knowledge of the situation. Quijada, who had worked for Agar for a short time, was terminated for failing to report the accident. Rodrigues testified about an incident with Agar driver Thomas Brown who was terminated in January 2011. His truck damaged two parked cars, but the company did not learn of the accident until three days later when it was notified of the accident by the local police department. The accident caused approximately \$1,600 damage. Brown had previously received two written warnings for a poor attitude.

There was testimony about other incidents as well. Daniel Carter, who has been a driver at Taunton for seven years, testified that one of his deliveries is to Club 59, a golf course with a restaurant. In order to make the delivery he must drive down a one way street to a cul-de-sac. It is difficult to maneuver and has resulted in him running over the grass on a number of occasions

and leaving tire marks. In 2012, he met with Nataupsky who told him that the customer had reported that he ran over the grass resulting in about \$300 in damages, but he told Carter that he was not going to be charged for an unreported accident. Carter testified that driving over the grass was different than damaging the roof of a tractor trailer, and that if he had damaged the roof of a tractor trailer, that would be an important thing to report. He also testified that failing to report an accident is a safety issue and a terminable offense. In May 2012 driver Scott Fitzgerald was driving in an alleyway and scratched the bumper of his truck; he did not report this incident when it occurred. He received a verbal warning for this incident. Nataupsky testified that this was a minor accident and Fitzgerald is hearing impaired and probably did not hear the scraping of the bumper.

Counsel for the General Counsel and counsel for the Respondent (as rebuttal) introduced into evidence documents establishing the discipline of employees of the Respondent at facilities other than Taunton and New Bedford. These submissions involve employees in a number of locations throughout the country and involves offenses ranging from failing to report that a mud flap had been torn off a truck to hitting a bridge, and knocking down a power line. The damage ranged from replacing a mud flap to \$40,000 to \$50,000 damage caused by hitting a tree. I have not considered any of these numerous situations because the disciplinary decisions were made by persons other than those involved herein, and few of the situations are truly analogous to the facts herein.

E. Other Facts

In order to establish a lack of animus, counsel for the Respondent, brought out the fact that regardless of the close election results, the Respondent did not file objections to the conduct of the election. Further, the parties have been negotiating and in the negotiations the Respondent offered a Union security clause and dues checkoff in its first contract proposal. The company has also offered Union steward language, a grievance and arbitration procedure, access to the facility, a Union bulletin board, and other items and the parties have reached agreement on almost all non-economic matters. In addition, the company has agreed to a new wage system for drivers that will raise the wages of ninety to one hundred percent of the drivers. In addition, Michael Mason, who is employed by Reyes Holdings, testified that in addition to Reinhart, Reyes owns the Martin Brower Company with twelve unionized distribution centers, as well as twelve or thirteen beer distributors, two of which are unionized. Reyes has also just executed a purchase agreement for a unionized beverage company in California.

III. Analysis

In determining whether Celluci was fired for failing to report the damage to his truck on May 14 or because of his support for the Union in successfully organizing the Respondent's employees, I look to the analysis in *Wright Line*, 251 NLRB 1083 (1980). Under this test, Counsel for the General Counsel has the initial burden of establishing a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in Respondent's decision to discharge him. If that has been established, the burden shifts to the Respondent to establish that it would have terminated him even in the absence of his protected conduct. I find that Counsel for the General Counsel has satisfied his initial burden herein. Although a number of employees were involved in soliciting authorization cards in the latest campaign, the evidence establishes that Celluci made the initial call to the Union, was the most active employee in the campaign, was the Union's observer at all three sessions of the election, and was chosen to be a Union shop steward. In addition, the Respondent's agents admittedly were aware of his Union sympathies, and his support for the Union in this, as well as two of the past campaigns. Further, he had been employed by Agar and the Respondent since about

1988, with a good driving record. These basic facts lead me to conclude that Counsel for the General Counsel has sustained his initial burden. The ultimate issue then is whether counsel for the Respondent has satisfied their burden that Celluci would have been fired even in the absence of his active and known support for the Union. I find that they have.

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Initially, I do not credit Celluci's testimony that he was unaware of the damage to the truck until he reported for work on May 15. The accident apparently occurred at the underground delivery he made to Sarku Japan, his first delivery of the day. Even with the refrigeration unit above the cab, considering the extent of the damage to the top of the truck, it is difficult to believe that he did not hear the damage at that time. As he had to have been driving very slowly through the underground delivery area, there was no outside noise to interfere with the sound of the sheet metal being torn from the roof of the truck. Further, as he walked around and behind the truck approximately fifty to one hundred times that day in the course of making his deliveries, it is also difficult to believe that he failed to see the damage, especially when he used the ramp to get into the truck and obtained goods from the freezer on the side of the truck. It seems to me that it would be difficult to miss the damage from those vantage points. And, finally, it is difficult to determine whether Celluci really felt sick and ran to the bathroom when he returned, causing him to perform a rushed post-trip inspection, or whether he simply didn't want to acknowledge the damage at that time, but neither Dunn nor Colon support his testimony that he told them on the morning of May 15 that because he was ill the prior day he performed an abbreviated post-trip inspection. Further, I credit Dunn's testimony that she learned of the damage from the yard man when she arrived for work at 4 a.m. that day, prior to Celluci reporting for work, and notified Colon of the damage. As the dispatchers arrive or work before the drivers, it is reasonable to assume that they were made aware of the damage before Celluci arrived for work. In addition, as Dunn is no longer employed by the Respondent, she would have no reason to fabricate this story. I therefore find that he must have known of the damage that occurred on May 14 and did not report it to Dunn before she told him of the damage. Counsel for the General Counsel, in his brief, argues that the damage was "too obvious to go unnoticed" and that it is therefore hard to believe that he believed that he could gain anything by failing to report the damage. Although this is an interesting argument, the fact remains that the damage was obvious, and he failed to report it.

An additional reason for finding that the Respondent has satisfied its burden under *Wright Line* is the lack of Union animus. There were no Section 8(a)(1) statements directed at Celluci even though the Respondent knew that he was one of the principal Union supporters. In addition, other than the instant situation, there is no evidence of post-election animus on the part of the Respondent. Regardless of the close election, the Respondent did not file objections to the election, and it appears that the Respondent has been bargaining in good faith with the Union and the parties have already agreed on numerous issues. Further, the evidence establishes that Reyes owns other unionized facilities. As proof of animus, Counsel for the General Counsel points to the Respondents pre-election campaign statements, although none of these statements were alleged or found to constitute unfair labor practices and, in his brief, he cites numerous cases finding that even though certain employer statements are not alleged as unfair labor practices, they can still be used to establish animus. *Lampi LLC*, 327 NLRB 222 (1998); *Ross Stores, Inc.*, 329 NLRB 573 (1999). Regardless, I find that the General Counsel has failed to establish a nexus between Respondent's pre-election campaign statements and Celluci's discharge. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999).

Counsel for the General Counsel also alleges disparate treatment between prior situations and Celluci's termination for failing to report his accident. The only situations that I have recognized as "similar" to Celluci's situation are those involving Carter and Fitzgerald. Carter's testimony establishes that driving over the grass at Club 59 was almost unavoidable

and only resulted in about \$300 in damages (and that seems high for tire marks on the grass), and Fitzgerald scratched the bumper of his truck, but Nataupsky explained that he was given a written warning because they determined that he might not have known of the damage because he is hearing impaired. In *Walker Stainless, Inc.*, 334 NLRB 1260, 1262 (2001), the Board stated: "...an employer may still meet its *Wright Line* burden by showing that 'the disparity in discipline between alleged discriminatees and the General Counsel's comparators is attributable to differences in work history, *to the severity of the misconduct*, or to some other factor unrelated to union activity,'" citing *Avondale Industries*, 329 NLRB 1064 (1999). Celluci's accident was clearly not comparable to the situations involving Carter and Fitzgerald.

On the basis of all of the above, I recommend that the Complaint be dismissed in its entirety.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1)(3) of the Act as alleged in the Complaint.

On these findings of fact, conclusions of law and based on the entire record, I hereby issue the following recommended⁴

ORDER

It is recommended that the Complaint be dismissed in its entirety.

Dated, Washington, D.C. March 24, 2014

Joel P. Biblowitz
Administrative Law Judge

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.